

No. 77-1440

Supreme Court, U. S.

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1977

MANUEL J. SUGAR,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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_____ PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT _____

Petitioner, Manuel J. Sugar (hereafter, defendant) prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Order Below

The Order of the Court of Appeals, unpublished per Seventh Circuit Rule 35, is reprinted as Appendix A, *infra*.

Jurisdiction

The Order of the Court of Appeals was entered on January 26, 1978. Defendant's timely petition for rehearing and suggestion for rehearing in banc was denied on March 14, 1978 (App. B, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22(2) of the Rules of this Court.

QUESTIONS PRESENTED

1.

Where the grand jury which indicted defendant heard only the prosecutor, unsworn, reading testimony given by an FBI agent before a former grand jury which did not indict, was there any evidence to support the indictment against defendant's claim that such deprived him of due process of law as guaranteed by the Fifth Amendment? Does this decision run afoul of principles of this Court as expressed in such cases as *Wood v. Georgia*, 370 U.S. 375 (1962), and does it conflict with law from the Fifth Circuit?

2.

Is the cursory manner via which the reviewing court "resolved" all the remaining issues against defendant repugnant to defendant's due process right to meaningful appellate review, where it does not even appear that the court took account of the factual context?

3.

Was the record so devoid of evidentiary support for the necessary element of scienter (that is, knowledge that the property was stolen) that defendant's conviction violates due process of law?

4.

Was defendant deprived of his due process right to present evidence of the relevant market which should be considered in evaluating his state of mind from inferences to be drawn from price differentials in the light of market conditions?

5.

Can defendant's trial be dubbed constitutionally "fair" in context, where the prosecution—by argument that the jury must impose morals on the business community, and by last-minute use of assorted uncharged transactions asserted to have been illegitimate though defendant had been promised the government was not claiming that any extra-indictment transactions involved stolen steel—importuned the jury to convict upon evidence devoid of proof of guilty knowledge on defendant's part?

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

"No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the assistance of Counsel for his defence."

Title 18, U.S.C. Sec. 659 provides, in pertinent part:

“§ 659. *Interstate or foreign shipments by carrier; State prosecutions*

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motor-truck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen;

Shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both. . . .”

Title 18, U.S.C. Sec. 371 reads, in pertinent part:

“§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire . . . to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both. . . .”

Statement of the Case

Defendant was charged with having possessed steel which had been stolen while moving in interstate commerce (Counts 2-7) and of conspiracy so to do (Count 1), in violation of 18 U.S.C. 659 and 371, respectively.¹

A jury found defendant guilty and the court imposed the maximum sentence, as required, pending diagnostic evaluation.²

On appeal, as in the District Court, defendant urged that the grand jury which indicted him was presented with no evidence whatsoever; that the evidence was insufficient as a matter of law to prove that he knew the steel was stolen;³ that he was prejudiced by prosecutorial misconduct, both in argument and in the introduction of evidence of extra-indictment transactions; and that the trial court's rulings were prejudicially erroneous in various areas, *inter alia*, limitation of defendant's right to present evidence concerning value of the property, where alleged discrepancy between market value and what defendant paid for the steel was used as a telling factor against him.⁴ The court affirmed. (App. A)

¹ A jointly tried co-defendant, one, Gelfman, likewise was convicted; the judgment was affirmed (76-2153; see App. 1-3) “Tr.” refers to the Transcript of Proceedings therein, and “App.” to the appendices hereto.

² Defendant is still awaiting sentence, the said evaluation as yet not having been completed in view of defendant's deteriorating health.

³ Also, defendant urged that there was absolutely no evidence at trial even to indicate, much less establish, the steel had been stolen from a physical facility enumerated in the statute, 18 U.S.C. 659. (App. 5)

⁴ Defendant further complained of prejudicial error in the court's ruling upon his motion for severance from co-defendant Gelfman, and for improper limitation of his constitutional right to cross-examine key witness Martin, (App. 6-7), based on an unusual extension and application of attorney-client privilege to justify the otherwise obviously prejudicial and unconstitutional limitation.

Statement of Facts

The grand jurors who indicted defendant were presented with nothing other than the prosecutor, unsworn, reading testimony of an FBI agent as given before a former grand jury which had not returned an indictment. (App. 4)

Appended hereto (App. C) in summary fashion is the Statement of Facts as contained in defendant's Brief filed in the Court of Appeals, No. 77-1172. Specific facts pertinent to our arguments are included hereafter as appropriate in context.

To capsule: Henry Martin, the government's "star" witness, did not even know defendant, nor had they any contact. Martin (the thief) dealt only with co-defendant Gelfman. Defendant's only dealings were with Gelfman, in a purely up-standing legitimate manner, one steel company to another. Defendant's company, Sugar Steel Corporation, had been doing business with Gelfman's company, Steel City Iron & Metal Co., with Gelfman and Gelfman's father for many years. (Tr. 1001-05)

REASONS FOR GRANTING THE WRIT

Prefatory Statement

The caveat of *Kotteakos*⁵ must, we submit, be applied when a court of review must decide whether to rule in a case it is not obliged to hear.⁶

We go one step beyond: As jurors are asked, "Would you want a member of your family, a loved one, to be judged by such as you?" With all respect, we ask Your Honors to recall a case—any case—in Your experiential recollection which You felt the Court should hear, so much so that You dissented, in mind if not in writing, from the majority's decision to deny discretionary review. *This* case is such that a just man should flinch at the thought that defendant for ever must bear the stigma of conviction. At least, take a look.

Let no astigmatic view cloud Your vision.⁷

Synopsis

Throughout his ordeal, as before and since, defendant, an attorney, has been a legitimate businessman. Yet, for all one can tell from the Order, (App. A), he could have hijacked the steel himself.

⁵ *Kotteakos v. United States*, 328 U.S. 750, 761-65 (1946), commanding reviewing courts to consider questions in context of all that occurred, not in a vacuum.

⁶ Invidious issues, out of context, may *appear* innocuous; appearances are deceiving.

⁷ Cf. *Unger v. Sarafite*, 376 U.S. 575, 589 (1964), cautioning against a "myopic" outlook.

Reading the Order, one never would guess that defendant Sugar, himself a reputable steel broker, bought the subject steel in the regular course of business from Gelfman, a legitimate steel businessman, pursuant to commercial documents normally used in such transactions.⁹ It is difficult, if not impossible, to justify the decision in the face of the facts, which are *nowhere* to be found in the Order, not even summarily. To reiterate: For all a reader of the Order could divine, defendant may as well have been a strongarm thief, or a purchaser for a miniscule fraction of the property's obvious value. *Not so.*

The pervasive facts are *so* persuasive of defendant's innocence that it is a travesty for a judgment of his guilt to be affirmed via this Order, which fails even to acknowledge *any* of the facts.

Charitably, this was an extremely close case. While our position is that the evidence was insufficient as a matter of law to support conviction, veritably the case was *so* close that any error—particularly in the admission or exclusion of evidence bearing on the crucial issue of defendant's mental state—may have induced the jury to convict.

⁸ Defendant, an attorney, testified without contradiction (and, incidentally, without rebuttal) that he acted as a steel warehouseman and broker for some 30 years. (Tr. 1001-05) His company, Sugar Steel Corp., did business with Gelfman's company, Steel City Iron and Metal Co., with Gelfman and Gelfman's father for many years. (Tr. 1004-95) Affirmative character and reputation evidence, as well as (limited) expert testimony *re* the steel market, also was introduced. (See App. 14-15)

⁹ Documentation *re* the count 2-7 property is in App. B. to defendant's Brief, in No. 77-1172. Defendant's testimony as to each count, detailing records of each transaction, may be found as follows: Count 2, Tr. 1019-20; Count 3, Tr. 1031, 1034, & 1036; Count 4, Tr. 1037-43; Count 5, Tr. 1045-48 & 1050-53; Count 6, Tr. 1053-58; Count 7, Tr. 1005-08 & 1016-19.

Because the factual posture of the case is not even touched upon (except in wholly conclusory fashion) in the Order, defendant appends hereto (App. C) the Statement of Facts contained in his original Brief. We urge that Your Honors consider the evidence presented before taking any position on this Petition.

Bear in mind that defendant purchased *every bit* of the steel here involved in the normal course of business, with appropriate documentation, in accordance with his own normal legitimate operation of his long-standing business, purchasing from another established business person with whom he was familiar. The prices he paid were not so relatively "low," as to put him, or any other reasonable man, on notice that anything was amiss.

* * *

The issues presented to the reviewing court—most notably, that no evidence was presented to the grand jury; that the evidence of "guilty knowledge" was insufficient; and that defendant was improperly limited in attempting to educe evidence as to a relevant market value of the property—were decided without proper regard for the factual setting and in disregard of the applicable law. Considering the prosecutor's exhortation that the jury should impose morality on the business community, the close question of defendant's state of mind was cast aside; these matters are of great and continuing importance to the administration of criminal justice.

Certiorari should be granted to permit this Court to consider the issues consistent with the Constitution, with a view toward preserving the principles of our forefathers, keeping foremost in mind that if a defendant can be convicted

upon an indictment returned by a grand jury which heard *nothing* but a reading by an unsworn prosecutor, tomorrow is already here.

1.

Defendant was deprived of due process of law, for no evidence whatsoever was presented to the grand jury; the Seventh Circuit panel's resolution of this question conflicts with the law of the Fifth Circuit.

Defendant's Fifth Amendment due process right to indictment by a grand jury was violated by the procedure via which the prosecutor here obtained the indictment against him. It is uncontroverted that the grand jury which indicted him was presented with nothing more than the prosecutor's unsworn reading of testimony given by FBI agent Hugh Graham before *a former grand jury which did not indict*.

Constitutionally, as secured by the Fifth Amendment, the grand jury is

"... a primary security to the innocent against the hasty, malicious and oppressive prosecution . . . serving the individual function in our society of standing between the accuser and the accused." *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

The Seventh Circuit panel answers that indictment based solely on the prosecutor's reading of this prior testimony was sufficient, relying on Supreme Court cases permitting convictions to stand upon indictments based on hearsay, or upon allegedly inadequate or incompetent evidence.¹⁰

Here, though, there was absolutely *no* evidence; only the prosecutor's unsworn reading of hearsay evidence (the transcript of the agent's prior testimony).

¹⁰ *Costello v. United States*, 350 U.S. 359 (1956); *United States v. Calandra*, 414 U.S. 338 (1974). (App. 4)

The court seeks to distinguish a case which squarely conflicts with its decision, *United States v. Hodge*, 496 F.2d 87 (5 Cir. 1974), by stating that there, the prosecutor "merely summarized" the former testimony, rather than, as here, reading it verbatim. This is a distinction without a difference; for the court's determination in *Hodge* that the Fifth Amendment was violated was based, *not* on the fact that what the prosecutor told the second (indicting) grand jury was not a verbatim reading, but rather, on the fact that (apparently) *no evidence was admitted other than the unsworn statements of the prosecutor*. The court remanded for hearing "for the purpose of determining whether the grand jury . . . received sworn testimony from someone other than the prosecutor." *Id.* at 88. Clearly, had the decision stood for what the panel says, there would have been no remand for this avowed purpose. Moreover, other language in *Hodge* demonstrates the conflict between this Order affirming Sugar's conviction and the Fifth Circuit approach. After acknowledging that an indictment may rest on hearsay, the court stated:

"[We] see no problem if government agents did in fact give sworn testimony before the second grand jury as to what they and other witnesses had stated to the first grand jury. But *informal unsworn hearsay from the mouth of the prosecutor only is something else altogether*. This, we think, is interdicted by the Fifth Amendment." *Hodge, supra*, at 88. (Emphases added.)

. . .

The grand jury exists to insulate the individual from arbitrary governmental action. That the second grand jury may have been told that they could call the agent if they desired to question him (see App. 4) is no consolation to defendant, who had no right to be present at either grand jury, let alone to present evidence. The manner

in which this indictment was returned—especially considering the evidence indicative of defendant's innocence which developed at trial—highlights what can happen when the government decides to "get" someone.

The panel's Order, disposing of this serious issue with grave overtones for the administration of justice, should not stand as law. Certiorari should be allowed.

2.

The cursory manner in which the Court of Appeals "resolved" all the remaining issues is repugnant to defendant's due process right to meaningful appellate review, for it does not even appear that the court took account of the facts.

All issues except for that concerning the validity of the indictment (*supra*) were resolved by the panel without reference to *any* of the substantive evidence. Even a perusal of that portion of the order disposing of co-defendant Gelfman's appeal (App. 2-3) demonstrates that the facts are nowhere alluded to—except to be deemed "sufficient"—*anywhere* in the Order.¹¹

While detailed exposition of voluminous evidence may not be required, certainly in such a case as this, where the thrust of the balance of defendant's arguments involves the paucity of the evidence to prove that he knew the steel was stolen,¹² affirmance may not be based upon an Order

¹¹ Cf. requirement of F.R.Cr.P. 23(c) that court in a bench trial enter findings of fact upon request. While no such overt requirement here applies, we submit the underlying reason for requiring factual findings—to permit adequate review thereof—similarly dictates that an appellate order which ignores the facts is infirm.

¹² As already mentioned, pp. 8-9, *supra*, the procedural errors urged become significant and prejudicial *because* of the evidentiary framework. See *United States v. Semeniuk*, 193 F.2d 508 (7 Cir. 1952).

which does not even touch upon the facts. The cursory manner in which all these remaining issues were resolved belies the Order's viability; for it does not even *appear* that those who have decided defendant's fate have done so realizing the reputable nature of *all* the transactions in which defendant engaged and for which he stands convicted.

With all due respect, it appears impossible to us to justify conviction in the face of the facts consistent with defendant's innocence; perhaps this is why no facts have been put forth in the Order. But whatever the reason for this glaring omission, the fact remains that the Order is devoid of even an *attempt* to show how guilty knowledge was inferable from the record evidence.

Omission of factual matter from the Order may render meaningful review by this Court less likely as well, for the bare conclusion that the evidence supports the conviction doubtless increases the difficulty defendant will have, attempting to gain entrance on certiorari.

The Order, affirming without reference to the facts, except to state they were sufficient, deprived defendant of meaningful appellate review. In our system of justice, no impediment to this fundamental right is tolerable. See *Nance v. United States*, 422 F.2d 590 (7 Cir. 1970); *Douglas v. California*, 372 U.S. 353 (1963).

3.

The record was so devoid of evidentiary support for the necessary element of scienter (that is, knowledge that the property was stolen) that defendant's conviction violates due process of law.

We do not quarrel with the proposition that in cases involving possession of stolen property, circumstantial evi-

dence is admissible, and may, indeed, be sufficient, to establish defendant's state of mind; that is, whether or not he knew the property was stolen. Here, however, the facts and circumstances tended to show, not that defendant had such knowledge, but on the contrary, that he acted in a purely honorable fashion inconsistent with any such knowledge.

Defendant dealt with the steel in a legitimate manner, as he did with all his transactions. He had no contact with the thief; only with a legitimate business concern. Documentation was on hand for all the transactions; defendant paid by check for material obtained from a known steel broker with whom he had done business for years. His conduct when investigated by the government was open, above-board and consistent with innocence. The evidence was such, we submit, that the government *had* to resort to such tactics as complained of on appeal even to get an indictment, much less a conviction.

We urge Your Honor to peruse the factual appendix hereto (App. C), and to compare the facts here with those in the cases referred to below; the facts here are *so* compatible with innocence when viewed in context and when compared with these cases,¹³ we submit this is that singular

¹³ Compare this case with the following: *Cherry v. United States*, 78 F.2d 334, 336 (7 Cir. 1935) (rev'd, transaction appeared regular; fair market price, going concern, at store, daytime); *United States v. Anost*, 356 F.2d 413, 416-17 (7 Cir. 1966) (rev'd, following *Cherry*, *supra*, indicating its viability despite its age); *United States v. Wainer*, 170 F.2d 603 (7 Cir. 1948) (rev'd, though no invoice, "We cannot agree that the defendant should go to prison on suspicion, even though it were a robust suspicion which this is not; *id.* at 606); accord, *United States v. Carengella*, 198 F.2d 3, 7 (7 Cir. 1952). By way of contrast, see the following cases affirming; the

(footnote continued)

case where certiorari is justified on a sufficiency-of-the-evidence claim, normally not one reaching such proportions. A conviction devoid of evidentiary support offends due process of law. *Thompson v. City of Louisville*, 362 U.S. 199 (1960). Affirmance here is a serious threat to justice.

While the "inference" of guilty knowledge which may be drawn from mere possession of stolen property may be sufficient to convict where such possession is *not* satisfactorily explained, here there *was* satisfactory explanation consistent with defendant's innocence. See *United States v. Anost*, *supra*; *United States v. Semeniuk*, 193 F.2d 508 (7 Cir. 1952).

While the government attempted to show that the price defendant paid for the various shipments of steel was below its actual value, any discrepancy was not so great as

(footnote continued)

evidence as to variance between actual and paid price, and inferences drawable from the non-regularity of transactions, point out that this case is entirely different: *United States v. Bletterman*, 279 F.2d 320, 322 (2 Cir. 1960) (jewelry whose accompanying papers showed \$30,000, sold for \$6,000); *United States v. Kessler*, 253 F.2d 290, 292 (2 Cir. 1958) (no documents of title; labels removed by defendant; extremely low sale price); *Melson v. United States*, 207 F.2d 558 (4 Cir. 1953) (marks obliterated from egg cartons; no bill of sale, though usual practice; defendant sold for from 40 to 50 cents a doz., eggs selling from 50 to 65 cents per doz. wholesale or 69 to 80 cents per doz. retail); *Henry v. United States*, 361 F.2d 352 (9 Cir. 1966) (no bill of sale, no records, contrary to usual practice between the parties; note: defendant there testified and neglected to disclaim guilty knowledge); *United States v. Knight*, 451 F.2d 275 (5 Cir. 1971) (sparkplugs selling for 54 cents a piece wholesale, or \$1.25 retail, were sold by defendant for 20 cents, less than half wholesale price); *United States v. Wilson*, 523 F.2d 828, 830-31 (8 Cir. 1975) (defendant believed jewelry worth \$40,000 to \$50,000; agreed to sell for \$10,000); *United States v. Johnson*, 515 F.2d 730, 732 (7 Cir. 1975) (defendant paid \$4,500 and \$4,300, respectively, for cars valued at over \$5,000 wholesale, almost \$6,000 retail).

to put a reasonable person on notice that the goods were stolen.¹⁴

4.

Defendant was deprived of his due process right to present evidence of the relevant market which should be considered in evaluating his state of mind from inferences to be drawn from price differentials in the light of market conditions.

The court's improper limitation of defendant's affirmative evidence as to the relevant market for valuation purposes, approved in typically cursory fashion by the panel (App. 6), made it increasingly impossible for the jury to decide in his favor. In a circumstantial "receiving stolen property" case such as this, defendant has a right to educe evidence of value¹⁵ and, we submit, here the relevant market went beyond that deemed "relevant" by the trial court and the panel. Defendant's expert witnesses, for years in the steel business, surely were more knowledgeable than either court to determine what market is relevant. Defendant most frequently purchased steel below mill prices. The steel market, we submit, must be considered as a national market, going beyond face-value prices from the mills; testimony of record so indicates. The improper limitation kept out evidence portraying the price paid even *closer* to "market value," thus depriving defen-

¹⁴ App. C to defendant's Original Brief, on file with the court of appeals, sets forth figures.

¹⁵ Defendant unquestionably has a right to introduce evidence of actual value to counter a suggestion that his price is indicative of guilty knowledge. *United States v. Werner*, 160 F.2d 438, 443 (2 Cir. 1947). Cf. *United States v. Williams*, 447 F.2d 1285 (5 Cir. 1971).

dant of an important opportunity for the jury to consider relevant evidence indicative of his innocence.

Defendant has a constitutional right to introduce evidence on his own behalf. *Washington v. Texas*, 388 U.S. 14 (1973). To the extent that reliance upon any federal rule of evidence may run against this, the Court should consider whether such rule or ruling constitutionally may be countenanced.

In view of the evidence, defendant's inability to present evidence of the relevant market value cannot be deemed harmless error.

• • •

As argued in Point 3, because the evidence was insufficient to establish defendant's requisite knowledge as to the stolen character of the goods, certiorari should be allowed, and defendant's convictions should be reversed. Alternatively, per Point 4, to give him the opportunity to have the jury consider the ultimate issues uninfluenced by improper restraints on his right to present evidence, remandment may be in order.

5.

Defendant's trial can not be dubbed constitutionally "fair" in context, where the prosecution—by argument that the jury must impose morals on the business community, and by last-minute use of assorted uncharged transactions asserted to have been illegitimate though defendant had been promised the government was not claiming that any extra-indictment transactions involved stolen steel—importuned the jury to convict upon evidence devoid of proof of guilty knowledge on defendant's part. The conclusion of "no prejudicial error" flies in the face of the facts.

Clearly, the evidentiary posture of a case is a relevant consideration in determining whether or not given irregu-

larity or error requires reversal; whether the error was "prejudicial." See *United States v. Semeniuk*, 193 F.2d 508 (7 Cir. 1952), reversing a possession of stolen property case for a faulty instruction wherein (as here) the case was very close, for in such a case *any* error might have adversely affected the jury to convict.

Here, the prosecution mis-advised the jury to impose morals on the business community. Moreover, defendant was surprised at trial (in violation of certain agreements with the government) by the introduction of evidence indicative of other non-indictment offenses—none of which, by the way, was established, only implied. The cumulative effect of these occurrences, we submit, made it impossible for defendant to receive a fair trial. The evidence was so slim that a guilty verdict seems unreasonable, had the jury *not* been importuned by these improprieties to convict. See *United States v. Franklin*, 471 F.2d 1299 (5 Cir. 1973) (absent hard evidence of guilty knowledge, reversed because jury heard implications of additional similar offenses); *United States v. Baum*, 482 F.2d 1325, 1331-32 (2 Cir. 1973).¹⁶

¹⁶ In *Baum*, the government surprised defendant with a damning witness. Reversing as to the pertinent co-defendant, the Court stated: "[I]n a case so close as this, we would rather give the defendant the benefit of the doubt than let the Government reap even a slight possibility of benefit from what we regard as a lack of candor unworthy of a prosecutor." 482 F.2d at 1332.

We level no such charge against the prosecutor here; however, we submit the manner in which the government "surprised" defendant with the additional-transaction evidence was equally prejudicial and impossible to meet at trialtime.

Moreover, due to the government's tardy decision to present this, defendant was precluded from demonstrating that one of the latter-

(footnote continued)

The Seventh Circuit panel's seriatim manner of resolving these questions fails to meet the "contextual" approach required by reason and this Court. See *Kotteakos v. United States*, 328 U.S. 750, 761-65 (1946).

PENULTIMATUM

Certiorari is appropriate for an additional reason not yet touched upon concerning any particular issue: that is, this is a case wherein the Court should welcome the opportunity to discuss the law and resolve important questions concerning the manner of proof, procedural questions relevant thereto, etc., with respect to "receiving stolen property" cases.

The issue concerning the relevant market for valuation purposes lacks guidelines; yet because of price as a factor in stolen property cases, as bearing on the crucial issue of "guilty knowledge," this is an area which *should* be uncovered.

The grand jury issue, too, is one of increasing importance. The manner in which prosecutors dominate grand juries is widely discussed; yet from such a case as this, one can discern arenas wherein creeping control has hardly begun to be exposed.

The manner in which the trial court handled the problems which arose during trial is not, we submit, the manner

(footnote continued)

day-asserted transactions *was* strictly legitimate, though the government then was planning to present star-thief witness Henry Martin to testify he had stolen the steel. Thus the jury was not exposed to telling impeachment of Martin. In denying defendant's motion for new trial on newly discovered evidence (consisting of proof that one of these later transactions was verifiably properly purchased steel), the District Court rejected this contention.

in which they should be handled; nor, for that matter, did the panel resolve them appropriately. This is, then, an appropriate case for decision in terms of this Court's supervisory power over the lower federal courts. *McNabb v. United States*, 318 U.S. 332, 340, 347 (1943); see *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957); *Thomas v. United States*, 368 F.2d 941, 946 (5 Cir. 1966).

* * *

Mr. Justice Stevens, of this Court, in dissenting (with Justices Swygert and Sprecher) from the Seventh Circuit's withdrawal of an order granting rehearing *in banc* as improvidently granted, commented on the court's supervisory power as appropriate for exercise on an *in banc* hearing. *United States v. Rosciano*, 499 F.2d 173, 176 n.2 (7 Cir. 1974).

Most apropos to this discussion, though, Justice Stevens stated:

"I believe we do this litigant and ourselves an injustice by failing to address an important issue squarely." *Id.* at 178.

The same may be said at bar.

* * *

We hear of atrocities committed abroad, and think, "It can't happen here." Well, it can; it's only a matter of time and degree.

A decree from this Court, descrying indictments unsupported by even a semblance of evidence, could turn the tide.

Yes, invidious issues, eyed out of context, may appear innocuous; but, just as all that glisters is not gilt, the just know not to be fooled by the wrapping paper. When the whole, as framed by the entire record, fairly reeks of con-

stitutional rights raped beyond recognition—or shrieks of innocence going down in deep water for the third time—then, despite any superficial gloss of guilt which permitted the two lower courts to imprimatur the jury's insensible verdict, this Court should right the wrong.

The grand jury is all that stands between a person being deemed an ordinary citizen, on the one hand, and dubbed a "defendant", on the other. From a defendant accused to convicted, "branded", is so short a step (witness *this* record) that the *first* step—to get the indictment—must not be so easy.

We no longer cut off a man's hand for stealing; only a part of his lifespan.

Take a long, hard look; then vote to grant the Writ.

CONCLUSION

For any or all of the reasons herein advanced—in particular, so that this Court may examine and condemn total prosecutorial control of grand jury functions to the tune of obtaining indictments on no evidence—certiorari should be allowed, and defendant's convictions should be reversed, or reversed and remanded.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued October 25, 1977)

January 26, 1978

Before

Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. WILSON COWEN, Senior Judge*
Hon. WILBUR F. PELL, Jr., Circuit Judge

Nos. 76-2153, 77-1172

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MARK T. GELFMAN and MANUEL J. SUGAR,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 76-CR-17

Thomas R. McMillen, *Judge.*

* The Honorable Wilson Cowen, Senior Judge of the United States Court of Claims, is sitting by designation.

ORDER

Defendants appeal from their convictions for conspiracy to possess and possession of steel which had been stolen while moving in interstate commerce in violation of 18 U.S.C. §§ 371 and 659. Defendants raise numerous arguments on appeal which include claims of insufficient evidence to support the verdicts, prosecutorial misconduct, and prejudicial errors by the trial court. After examining defendants' contentions, we find no reversible error and affirm.

I. *Gelfman* No. 76-2153

Gelfman first raises three arguments regarding the sufficiency of the government's evidence. Gelfman contends that the government failed to show that he possessed the steel or had knowledge it was stolen as alleged in Counts 2, 3, 4, 5 and 7, that he possessed the steel or had knowledge it was stolen as alleged in Count 6, and that he participated in the conspiracy alleged in Count 1. We have examined the record ad, viewing the evidence in the light most favorable to the government, find substantial evidence to sustain the verdict of the jury. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

Gelfman claims that certain misconduct on the part of the prosecuting attorney prejudiced him before the jury and therefore his conviction should be reversed and the cause remanded for a new trial. Gelfman's arguments in this regard stem from the prosecuting attorney and government witnesses referring to the subject steel as "stolen" which, defendant claims, was the key fact the jury was asked to determine. Generally, in such cases, any possible prejudice is cured by the trial court sustaining the objection, striking the responses, and giving a curative instruction. *United States v. Lozano*, 511 F.2d 1, 6 (7th Cir.), cert.

denied, 423 U.S. 850 (1975). We find this procedure was properly followed here and thus no reversible prejudice has been shown by these isolated uses of the word "stolen." (Tr. 500-01.)¹

Finally, Gelfman claims that the district court committed certain errors which are sufficiently prejudicial to warrant reversal. First, Gelfman claims that the trial judge erred when he refused to give a "two-conclusions" instruction which would have expressed defendant's theory of the case.² However, the district court had already given several instructions explaining the government's burden to prove Gelfman guilty beyond a reasonable doubt. (Tr. 1308-09, 1313-15, 1322.) Thus, "since the trial judge adequately described the government's obligation to prove the defendant guilty beyond a reasonable doubt, the failure to give such an instruction is not reversible error." *United States v. Johnson*, 515 F.2d 730, 732 n.7 (7th Cir. 1975).

Gelfman's second assignment of error is that his sentence was excessive since other violators of 18 U.S.C. § 659 have received lesser punishments. Since the defendant's sentence here is within the statutory limits and no gross abuse of discretion has been shown, the sentence is valid. *Dorszynski v. United States*, 418 U.S. 424, 431 (1974); *United States v. Wilkinson*, 513 F.2d 227, 234 (7th Cir. 1975).

¹ We need not decide whether Fed. R. Evid. 701 and 704 would allow testimony that the steel was stolen in this case regardless of it being an ultimate issue since the trial court sustained the defendant's objections. See *United States v. Smith*, 550 F.2d 2/7, 281 (5th Cir. 1977).

² The proposed defense instruction, S-10, stated: "If two conclusions can be reasonably drawn from the evidence, one of innocence, and one of guilty, the jury should adopt the one of innocence." (App. 31.)

II. *Sugar* No. 77-1172

Defendant Sugar argues first that his indictment by the January, 1976 grand jury was in violation of the fifth amendment. Defendant claims that no evidence was presented to the grand jury since the prosecutor merely read a transcript of the testimony given to the December, 1975 grand jury by F.B.I. agent Hugh Graham. The first grand jury did not vote on a promised indictment.

The Supreme Court has consistently held that a grand jury may consider virtually any type of evidence including their own knowledge of the events in question. *Costello v. United States*, 350 U.S. 359, 362 (1956). The validity of an indictment "is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. . . ." *United States v. Calandra*, 414 U.S. 338, 345 (1974). An indictment may be based exclusively on hearsay. *Costello v. United States*, *supra*. Thus, reading transcripts of prior grand jury testimony to a second grand jury has been approved by other courts. *United States v. Chanen*, 549 F.2d 1306, 1311-12 (9th Cir. 1977).³

Accordingly, we find no error in this indictment being based upon the verbatim reading of transcripts of former grand jury testimony by the prosecutor where the second grand jury was told they could call the absent witness for

³ Defendant attempts to distinguish *Chanen* by arguing that the second grand jury in that case was also presented with live testimony of a governmental agent in addition to the agent reading the prior testimony. The *Chanen* court, however, did not rest its decision on the reader of the transcript being a sworn witness separate from the prosecutor. Rather, that decision emphasized the full disclosure to the grand jury of the hearsay nature of the transcript. That the prosecuting attorney, rather than a sworn witness, read the previously sworn testimony in this case is not significant. *United States v. Blitz*, 533 F.2d 1329, 1344 (2d Cir. 1976).

direct questioning if they wished. *United States v. Pastor*, 419 F.Supp. 1318, 1323 (S.D.N.Y. 1976). Despite Sugar's argument that no evidence was presented, the reading of a transcript of prior sworn testimony did constitute evidence. The principal case cited by Sugar, *United States v. Hodge*, 496 F.2d 87, 88 (5th Cir. 1974), is distinguishable since the prosecutor there merely summarized the evidence presented to the prior grand jury rather than reading the prior sworn testimony verbatim.

Sugar also argues that the evidence was insufficient to prove (1) that he had knowledge the steel he bought from Gelfman was stolen and (2) that the steel was stolen from a medium specified in the statute. After examining the record, we find no merit in Sugar's claims of insufficient evidence. *Glasser v. United States*, *supra*.

Sugar further argues that certain misconduct by the prosecuting attorneys constitutes reversible error. First, defendant argues that the government's final argument contained improper statements concerning the jury's duty (Tr. 1306) and the proper conclusion to be drawn from Sugar's records. (Tr. 1305.) Viewed as a whole, we find the prosecution's final argument to be nonprejudicial. *United States v. Greene*, 497 F.2d 1068, 1085 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975).

Second, Sugar claims that the evidence as to the extra-indictment transactions should not have been allowed since the testimony was unreliable and that the government failed to notify the defendant, as agreed, that certain transactions did involve stolen steel. We do not find reversible error in the admission of evidence concerning the extra-indictment transactions. Fed. R. Evid. 404(b). Nor do we find prejudicial the government's waiting until trial to notify Sugar that certain transactions might involve stolen steel. (Tr. 1117-23.)

Finally, Sugar contends three rulings of the trial court were in error and require reversal. First, Sugar argues that the trial court erred when it quashed the subpoena duces tecum which Sugar had served on Martin's two attorneys. The subpoena sought all records, statements, and memoranda in possession of the lawyers regarding matters Martin had testified about or discussed with the government. Sugar argues that this material was necessary to his effective cross-examination of Martin and that any attorney-client privilege was lost when Martin testified about the transactions.

There is no doubt that by taking the stand, Martin put his credibility in issue and was subject to cross-examination. However, by testifying or talking to government lawyers about the transactions, Martin did not lose his attorney-client privilege as to communications with the lawyers. *Goldman, Sachs & Co. v. Blandis*, 412 F. Supp. 286, 288 (N.D. Ill. 1976). Once a client has told an outsider a fact, he may no longer invoke the protection of the attorney-client privilege as to that fact. However, while the fact is not privileged, the communications between the lawyer and client concerning that fact are privileged. 8 Wigmore, Evidence, § 2327 at 637-638 (McNaughton Rev. 1961). Thus, while Martin could not claim the privilege in refusing to answer questions concerning the transactions based upon information which Sugar obtained independently, he could refuse to allow his lawyers to furnish that information. We note also that Sugar's subpoena called for materials prepared by Martin's lawyers which would constitute work product and thus were not discoverable. *Hickman v. Taylor*, 329 U.S. 495 (1967).

The second trial court error claimed by Sugar is that the trial court abused its discretion in denying his motion for severance from Gelfman. The issue to be decided

when determining whether severance should be granted is "whether it is within the jury's capacity, given the complexity of the case, to follow admonitory instructions and to keep separate, collate and appraise the evidence relevant only to each defendant." *United States v. Kahn*, 381 F.2d 824, 838 (7th Cir.), cert. denied, 387 U.S. 1015 (1967). Here, Sugar's role in transactions was clearly distinct from that of Gelfman and the evidence of their individual involvement was easily separated by the jury. Also, defendant's citation of *United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976), as supporting severance when there is a great disparity in the evidence between the co-defendants is not helpful. Here, as noted above, there was sufficient evidence to support Sugar's conviction and, given Sugar's and Gelfman's differing roles in the scheme, there was little chance of a "rub-off" effect. Moreover, the court carefully instructed the jury regarding its responsibility to consider the evidence against each defendant separately. (Tr. 1322-23.) Therefore, we find the trial court did not abuse its discretion in denying Sugar's severance motion. Fed. R. Crim P. 14.

Sugar's third contention of trial court error is the limiting of the direct testimony of Jules Davis. Defendant argues that by limiting Davis' testimony regarding the steel market to steel coils in the Chicago area, the trial court lent support to the government's emphasis on mill prices as opposed to secondary markets. After examining the transcript, we find this argument to be without merit. (Tr. 912-16.) The trial judge allowed Davis to testify fully within the bounds of relevance.

III.

For the reasons stated above, the convictions of Mark T. Gelfman and Manuel J. Sugar are affirmed.

AFFIRMED.

APPENDIX B**UNITED STATES COURT OF APPEALS**

For the Seventh Circuit

Chicago, Illinois 60604

March 14, 1978

Before

Hon. LATHAM CASTLE, Senior Circuit Judge

Hon. WILSON COWEN, Senior Judge*

Hon. WILBUR F. PELL, JR., Circuit Judge

No. 77-1172

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

MANUEL J. SUGAR, *Defendant-Appellant.*Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 76-CR-17

Thomas R. McMillen, *Judge.***ORDER**

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the aobve-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, **DENIED.**

* The Honorable Wilson Cowen, Senior Judge of the United States Court of Claims, is sitting by designation.

APPENDIX C**STATEMENT OF FACTS***

Manny Sugar was charged with conspiring to possess stolen steel (Count 1) and of possessing it, knowing it to have been stolen (Counts 2-7).

The evidence taken in the light most favorable to the Government was as follows:

The Government called as witnesses employees of the steel companies and shippers to testify concerning certain documentation relating to the steel allegedly stolen. Those witnesses had no knowledge of the facts in the case except for the information obtained from the documents. They included Mr. Ludwig King of Inland Steel (Count 2), Mr. James Kossman of Great Lakes Steel Plant (Count 5), Mr. Lawrence Twork of Yellow Freight Systems, Steel Transport Division (Counts 2 and 5), Mr. Albert Grass of Essek Steel Company (Count 3), Albert Hoop of Brada Miller (Count 3), William O. Richardt of Bethlehem Steel (Count 6), Marshall Kilpatrick of D. F. Bant Trucking (Count 6), Gordon Sanback of U.S. Steel (Count 7), and John Gordon of Gordon Motor Freight Transportation (Count 7).¹

The steel in each case was allegedly "picked up off the street" by the co-defendant Martin. Martin would call Gelfman to tell him about the steel. Gelfman would contact Sugar. Martin was then contacted by Gelfman and

* From pp. 2-10 of defendant's brief, on file with this Court. Remaining footnotes reproduced therefrom.

¹ The documents referred to by these witnesses are reproduced in Appendix B. The documents were marked at trial with the initials of the witness who testified about it and the number of the count to which it relates.

told to deliver it to Gary Steel Supply Company (Counts 2, 3, 4, 5 & 7) or Pullman Steel Warehouse (Count 6) for the Sugar Steel Corp. account. Gelfman made up the bill of lading for the first shipment (Count 2) and Martin prepared them for the other loads (Tr. 480-483). Martin destroyed the mill tags and bills of lading after preparing the new bills of lading. In Martin's opinion the steel was prime (Tr. 493). He received payment in cash shortly after delivery of the steel to the warehouse, and seemingly after Gelfman was paid (Tr. 484-490). Martin never met or spoke with Sugar. The steel in each case was delivered and received at the respective warehouse on behalf of Sugar Steel Corp.

As to the steel in Count 7, Sugar and one, Julio Morales, the night plant moneger for Gary Steel Supply Co. inspected it. The steel wah wrapped and had U.S. Steel mill tags. Sugar said the steel looked "real good." (Tr. 405-509). Morales took the tags off to creck the weight and gauge. The weight on one was shown to be wrong when weighed at Sugar's request. The steel was in "prime" condition in Morales' opinion (Tr. 410-413). Morales noted steel is a delicate product which can be easily damaged. Steel, which appears to be in prime condition, is often times found to be damaged when the coil is opened (Tr. 417-419).

Thomas G. Olinger, former salesman for Gary Steel Supply, testified he purchased the steel referred to in Count 7 from Sugar Steel Corp. for \$10.50 per hundredweight. The steel was wrapped in U.S. Steel wrappers and, in his opinion, in prime condition.² Sugar, in selling it to Olinger, told him the steel was prime and he, Sugar,

² Although not qualified as an expert, Olinger was allowed to testify as to his opinion. His experience was that he had bought and sold steel for six months.

had paid \$8.76 per hundredweight and, therefore, should get \$10.50 per hundredweight.³ (Tr. 430-439). Olinger testified he had purchased steel at below mill prices and that damaged steel of this type would sell for approximately \$5 to \$7 a hundredweight. (This was the price range Sugar paid for the steel referred to in each count.) Olinger was the only Government witness to testify about the steel market or the price of steel and he testified only as to the steel in Count 7.

The steel in Count 6 was stored at Pullman Steel Warehouse. Sugar Steel generally stores steel at Pullman, but not usually coils. Sugar on occasion came and inspected the steel stored there.

The records of Sugar Steel Corp. for each transaction included cancelled checks, voucher copy of the checks, receipts, invoices, purchase orders, work sheets, note pads, and acknowledgement receipts, relating to the purchase, fabrication, storage and sale of all the steel. (See footnote 1, page 2)

The Government also introduced the testimony of Agent Hugh Graham of the F.B.I. concerning his interview of Sugar at the very inception of the investigation. He testified that Sugar was contacted without any advance notice in July of 1973 at a customer's office. Sugar told him he had examined the two steel coils involved in the transaction charged in Count 7 of the indictment. He told Agent Graham he purchased the steel from Gelfman and provided the documents concerning its purchase and storage. (See Appendix for documents).⁴ Graham stated that Sugar

³ No evidence except this recollection testimony of Olinger was submitted to verify this supposed fact.

⁴ The same type of documentation was supplied later for the steel in the other counts.

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told him he had paid a low price for the steel, because he did not know the condition of that steel (Tr. 445-449). Graham stated that Sugar may have stated to him that he had pulled the tags to verify the price and that he found the steel to be in good condition (Tr. 669). Graham stated that he did not talk to anybody who purchased the steel from Sugar (Tr. 669-697). Graham did not confiscate the steel alleged in Count 7 to have been stolen which was then sitting in the Gary Steel Supply Co. yard. Nor did he take any precautions with regard to preserving it as evidence. In fact, he did not even have it examined to verify it was the stolen steel.⁵

The defendant, Gelfman, testified and called character witnesses (Tr. 773-78 and 801-905).

The defendant, Sugar, called two expert witnesses. The first was Mr. Jules Davis of 3740 North Lake Shore Drive. Mr. Davis is President of Alert Steel Products Company, and independent steel company. He was aware of the steel market during the years 1972 and 1973 and bought and sold steel coils and plates in those years. He purchased his steel from mills, warehouses and brokers and surplus suppliers (Tr. 908). The market condition for steel, including steel coils, was depressed in 1972 and early 1973 and there was considerable surplus steel available (Tr. 916).

Davis was then asked to state an opinion as to the fair market value of the steel allegedly involved in Counts 2 through 7 at the time in question. His opinion was based on the gauge, width and weight of the steel and its marketability (Tr. 941-942).

⁵ The Government also introduced evidence of four (4) allegedly similar transactions which evidence is discussed separately in this Brief.

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The steel purchased in September of 1972 (Count 22) was worth between 5½ and 6 cents per pound. This price was due to the fact that the steel was surplus and made especially for one customer and was not a normal gauge (Tr. 917-920).

The steel purchased in October, 1972 (Count 2) had a lower price range because the width of the coils was not standard (Tr. 920-921).

The steel purchased on November 16, 1972, (Count 4), was a standard width and was worth about 7 cents per pound. It was a more marketable product (Tr. 921).

The steel purchased on November 27th (Count 5), was flat sheets and not standard. The heavy weight of each life (bundle) and abnormal mill weight, made it worth 5½ to 6 cents per pound. This was a reasonable price due to the handling problems involved (Tr. 922-923).

The steel involved in the May 23rd purchase (Count 6) had a more standard gauge, but the width was not normal, thus a price of 6.5 to 6.75 cents would be the approximate value (Tr. 923-926).

The fair mark-up for steel is 20% to 25% if you do not take possession and 33% if you have to take possession as Sugar did (Tr. 946-948). The price of excess steel purchased directly from the mill is less than the price that was to be charged the original customer (Tr. 948). It is not possible to determine whether steel is prime by the naked eye.

The next expert was Mr. Richard Weiss of Wilmette, Illinois. He is President of Weiss Steel Company and a major stockholder in Pullman Steel Warehouse. His company dealt in buying and selling steel. 6,000 tons and/or \$4,000,000 for the years 1972 through 1975, including steel

coils (Tr. 955-958). He bought steel coils during that time at below mill price (Tr. 958).

Weiss' opinion as to price in general was similar to that of Davis, ranging between 5 to 7 cents per pound for the steel, with the price increasing in 1973 due to the industry picking up (Tr. 959-964). A fair profit for this type of steel during 1972 and 1973 would be \$1.50 and \$2.00 per hundred-weight (Tr. 966).

Sugar Steel stored steel within the Pullman warehouse along with other companies. Sugar Steel did not have trucks to transport steel (Tr. 967-969). Weiss further stated that you cannot tell if steel is prime by looking at it with the naked eye (Tr. 970). You would generally pay a higher price for steel purchased directly from a mill and/or steel fabricated to specifications (Tr. 971). The only way you could tell if steel was prime was to perform a chemical analysis, but you would normally only check such steel if you were buying from some unknown person (Tr. 975-976). You would not normally have steel from a mill checked because you are guaranteed the quality (Tr. 977). Just because the steel is in U.S. Steel wrappings and has U.S. Steel mill tags does not make it prime (Tr. 975-980).

The defendant then called as character witnesses Mr. Fred Randolph, 9530 Central Park, Skokie, Illinois, a steel broker engaged in the steel business for 24 years (Tr. 987-989); Mr. William Townsley, 211 Birchwood Avenue, Wilmette, Illinois, President of Summit Steel Company, engaged in the steel business for 22 years (Tr. 989-992); Mr. James Laschober, 9423 South Springfield, Evergreen Park, Illinois, general manager of Laschober & Sons Cartage Company, engaged in the steel cartage business for 18 years; Mrs. Helen Frederick, 56 Graymore Lane, Olympia Fields, Illinois, WBBM Radio broadcaster and neighbor

of the Sugar family (Tr. 995-998); in addition to Davis and Weiss, each of whom testified Sugar was an honest, truthful man whose reputation was beyond reproach.

The defendant, Manuel Sugar, testified in his own behalf. He has lived at 107 Graymore Lane, Olympia Fields, Illinois, for 15 years (Tr. 1001). He grew up in Whiting, Indiana, went to the University of Indiana to college and law school. He is licensed to practice law in Indiana, Illinois, United States District Court for the Northern District of Illinois, and United States Supreme Court. He has not practiced law for about 30 years during which time he has been in the steel business, both warehousing and brokering.

Sugar stated that he had done business with Steel City Iron and Metal Company, the co-defendant Gelfman and Gelfman's father, before his retirement for numerous years (Tr. 1004-1005).

He received a phone call from Gelfman in June, 1973, asking him if he wanted to buy some tin plate. After haggling about the price, Sugar paid Gelfman by check \$2,507.50, which was \$7 per hundredweight. Although he might have removed the mill tags from the steel, the only thing he could recall was that the steel was acceptable.⁶

Sugar stated that he and Olinger haggled about the sale price to Gary Steel Supply Company. He does not generally state his cost to a potential purchaser (Tr. 1015).

⁶ Sugar testified concerning each Sugar Steel Corp. record related to the transactions involved. He described in detail the procedure for each purchase and sale and the sequence in which the records were prepared. (Tr. 1005-1008 and 1016-1019 for Count 7; Tr. 1019-1020 for Count 2; Tr. 1031 and 1034, 1036 for Count 3; Tr. 1037-1040 and 1041-1043 for Count 4; 1045-1048 and 1050-1053 for Count 5; and Tr. 1053-1058 for Count 6.) As stated previously, those documents are reprinted in Appendix B.

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As to the steel allegedly involved in the other transactions, Sugar stated that generally he received phone calls from Gelfman offering him the steel; that after either he or Julio Morales checked the weights of the steel and to see if it was acceptable. He would pay Gelfman by check, by mail or Gelfman would pick up the check personally (Tr. 1019-1052).

During 1972 he was purchasing steel on the average of twice a day and making approximately ten to twenty sales a day (Tr. 1039).

Sugar further testified that in 1972 his company had an inventory of 3 to 4 thousand tons and that less than 5% of his business was in steel coils (Tr. 1058). Sugar did not know the steel involved was stolen if, in fact, it was (Tr. 1061).

Gelfman never told him the steel was rusted, damaged or even in good condition (Tr. 1064 and 1065). He always found the steel to be "acceptable" (Tr. 1065). Sugar denied telling Olinger that the steel was "prime", but may have stated that it was beautiful (Tr. 1067). He bought the steel "taking a chance that it was alright inside." (Tr. 1070).

Ninety-five percent (95% of his business in 1972 and 1973 was for steel purchased below mill price (Tr. 1085).

After the introduction by the defendant of the original checks paid to Gelfman, the defendants rested (Tr. 1097). The Government offered some rebuttal as to Gelfman, *but none as to Sugar.*